In the
Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1035

WILLIAM M. PACE, ET AL.,
Petitioners

versus

DEPARTMENT OF TREASURY, ET AL.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CITATIONS

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Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit rendered September 28, 1978.

OPINIONS BELOW

The unpublished decision of the U.S. Court of Appeals for the Fifth Circuit, without opinion, affirmed the U. S. District Court order on September 28, 1978, and is attached as Appendix C. The U.S. District Court Magistrate's recommendation (Appendix A) was adopted by the U.S. District Court in its order (Appendix B), filed September 22, 1977.

JURISDICTION

The jurisdiction of this Court is invoked under Rule 19.1 (b) of the Rules of the Supreme Court of the United States

and 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the U.S. Civil Service Commission is required to compare positions of federal investigators when a complaint is received, to assure compliance with the "equal pay for substantially equal work" statute, 5 U.S.C. 5101.

STATEMENT OF THE CASE

In November 1974, seventy one experienced GS-11 Special Agents of the Bureau of Alcohol, Tobacco and Firearms, Department of Treasury, submitted a grade classification appeal to their agencies (BATF and Treasury) that they had the same assigned duties and performed the same job as GS-12 agents; and furthermore, that BATF special agents were not, in general, classified as highly as investigators in other federal investigative agencies.

BATF and Treasury forwarded the complaint, without action, to the U.S. Civil Service Commission.

The substance of the appeals was that in the unique field of criminal investigation, it would be necessary to survey the question on a national basis. That is, all type crimes are not being committed all of the time in all of the places and, in fairness to all, it would be necessary to compare the "postions" of higher graded investigators with those of the petitioner special agents.

The Commission apparently agreed with the agents, and in March 1975, centralized the appeals from ten states because of "national implications." During the following months the

Commission changed its mind, and in September 1975 issued an opinion that it would not examine the "central issue," but would examine the duties performed by each appellant agent at his specific post of duty during an arbitrary time span chosen by the Commission. (That decision is attached as Appendix D.)

Thus, the Commission refused to "compare positions" and avoided the central issue. The Commission refused to compare positions of an appellant agent with those of another agent in his same office as well as to make a comparison of positions between BATF special agents and those of any other national investigative agency.

Each appellant agent had exactly the same argument as all the other appellant agents. Some of them may have "won" their appeal by submitting to the Commission decision if a "complex" crime had, by chance, occurred at his post of duty. Some of them may have "lost," by chance, but the winners would have been in exactly the same "position" as the losers.

The agents appealed this Commission decision to the U.S. District Court under the judicial review section of the Administrative Procedures Act, 5 U.S.C. 702 (attached as Appendix E). The Commission defended its action on the grounds that the Commission was not required to make comparisons of positions in the federal service; and that its decision was not a "final" decision, therefore the agents had not exhausted their administrative remedies.

The District Court agreed with the Commission and adopted a recommendation by the U.S. Magistrate that the com-

plaint be dismissed and the class action not be certified. The U.S. Court of Appeals for the Fifth Circuit affirmed the District Court's dismissal.

ARGUMENT

The agents based their appeal on 5 U.S.C. 5101 (1)(A) which mandates "equal pay for substantially equal work," and emphasized the importance of the matter by pointing out that "the integrity of our enforcement system depends in large part upon investigators being treated fairly and lawfully; otherwise, the investigator who is willing to advance the carreer of his supervisor, by whatever means, will improve his own pay. Those who attempt, in many cases, to stick closer to the truth and the Constitution, do not advance their careers very well."

The power to adjust investigators' pay on factors other than the classification of assigned duties on a nationwide basis, is an extremely dangerous power to leave in the hands of enforcement agency managers. The Congress did not intend to do that and enacted the section previously cited (5 U.S.C. 5101) as well as the Federal Pay Comparability Act of 1970:

> 5 U.S.C. 5301 Policy
>
> (a) It is the policy of Congress that Federal pay fixing for employees under statutory pay systems be based on the principles that - (1) there be equal pay for substantially equal work

Conflict in Decisions of U.S. Courts of Appeal

The effect of this decision by the U.S. Court of Appeals for the Fifth Circuit is that the Civil Service Commission is not required to compare positions in order to assure equal pay for substantially equal work. This is in direct conflict with the U.S. Court of Appeals, District of Columbia Circuit, that held in *Haneke v. Secretary of H.E.W.*, 535 F. 2d 1291 (1976) that the refusal by the Commission to even consider whether it was applying two labels to the same work was arbitrary and capricious.

Haneke, a glassblower, alleged that he was performing identical duties with higher rated employees in his own shop and in other agencies. The Commission refused to make the comparisons. Haneke sought retroactive back pay and mandamus to compel the Commission to make the comparisons for prospective relief. The District Court denied both remedies. The Court of Appeals affirmed the denial of back pay on the basis of *United States v. Testan*, 424 U.S. 392 (1976), 47 L. Ed. 2d 114, but they required the District Court to remand and direct the Commission to make the comparisons requested by Haneke.

Issue Not Settled by the Supreme Court

Testan, supra, brought two questions to the Supreme Court: 1. Can a government employee, who alleges he has been classified improperly, collect retroactive "back pay" or more specifically, can the U.S. Court of Claims award retroactive money damage relief in wrongful classification cases?; and 2. Can the courts, with a view toward prospective relief, order the Commission to compare positions of some employ-

ees with those of employees in other agencies.

The Supreme Court clearly answered the first question: retroactive relief is not available in classification cases, but the Court sidestepped the second question. By holding that the U.S. Court of Claims did not have jurisdiction to award back pay the court found it "unnecessary for us to consider the additional argument advanced by the United States that the Classification Act does not require that positions held by employees of one agency be compared with those of employees in another agency."

CONCLUSION

The controlling question in this case is whether the Commission is required to compare job positions in order to comply with the "equal pay for substantially equal work" statute. If they are required to do so, then the petitioner agents exhausted all administrative remedies. If the Commission is not required to compare positions, then the government is correct when they assert that the agents did not exhaust administrative remedies. (The "exhaustion" question is contained within the "comparison" question.)

The agents have not requested the Commission or the courts to raise their classifications. They merely requested that their job duties be compared with the duties of higher classified agents and they were willing to take their chances concerning the outcome. (The petitioner agents, including the named petitioner who retired in 1976, have long since given up any hope of back pay. The question of prospective relief for those who remained in service is still active, but a more important question concerns how the investigative

agencies will be managed.)

It is respectfully submitted that this Court should review the lower courts' decisions and remand the case with instructions to supervise the investigation and comparison of positions by the Civil Service Commission.

Respectfully submitted,

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PROOF OF SERVICE

In furtherance of the Rules, I certify that I have served three copies of the above petition for writ of certiorari upon Mr. H. M. Ray, United States Attorney, Post Office Box 886, Oxford, Mississippi 38655, and three copies to the Solicitor General, Department of Justice, Washington, D.C. 20530.

This the 22nd day of December, 1978.

_____

WILLIAM M. PACE

APPENDIX A

REPORT AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

Filed: July 11, 1977

WILLIAM N. PACE, Plaintiff

vs. NO. EC 75-168-S

DEPARTMENT OF THE TREASURY, ET AL,
Defendants

REPORT AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE

The defendants have moved to dismiss the above entitled action or, in the alternative, for summary judgment in their favor, on the grounds that (1) plaintiff has failed to exhaust administrative remedies; and (2) plaintiff's retirement from the Bureau of Alcohol, Tobacco and Firearms of the Treasury Department (BATF) renders his own claim moot and also makes him an improper class representative. Plaintiff has moved for certification of a plaintiff class consisting of all BATF special agents in pay grade GS-11. Both motions have been referred to the magistrate for report and recommendations.

When this action was filed plaintiff Pace was a BATF

agent, GS-11, one of two pay grades established for special investigators. The other is GS-12. The substance of plaintiff's claim is that all BATF special agents perform essentially the same work and have the same responsibilities within their assigned territories. Plaintiff claims that this is true, regardless of whether the special agent is a GS-11 or a GS-12. This being so, plaintiff says, the designation of some special agents as GS-11s, while others are GS-12s, is an arbitrary system of classification which is not founded upon any objective standards distinguishing the duties and responsibilities of those in one pay grade from those in the other. Accordingly, plaintiff contends that the present system of establishing pay grades for BATF special agents violates the basic principle of equal pay for substantially equal work mandated by 5 U.S.C. § 5101(1) (A). Plaintiff also contends that BATF special agents, as a group, are, considering the nature of their duties, not as well paid as employees of other federal criminal investigative agencies doing substantially the same work and that this, too, violates the principle of equal pay for substantially equal work. As stated by plaintiff's counsel in the course of oral argument on these motions, what plaintiff Pace seeks in this action on behalf of himself and all other BATF GS-11 special agents is an adjudication that all BATF special investigators perform substantially the same work, and a remand to the Civil Service Commission (CSC) with directions to determine the pay grade within which that work properly fits.[1]

1. The system of classification of federal employees is established in 5 U.S.C. §§ 5101-5115. Under that scheme each "agency," as defined in §5102(a)(1), is required to assign each position under its jurisdiction to an appropriate class and grade, consistent with standards published by the Civil Service Commission. §5107. When warranted by the facts, an agency has authority to change the class or grade of a position to another class or grade. *Id.* A "class" is a type of work or occupation,

(Footnote continued on next page)

Plaintiff also asks that the court fix a time limit within which CSC must act upon remand.

Both plaintiff and defendants have filed elaborate affidavits to which are attached voluminous exhibits in support of their respective positions on defendants' motion to dismiss or for summary judgment. Therefore, the motion must be considered as a motion for summary judgment, Rule 12(b), Federal Rules of Civil Procedure, and is governed procedurally by Rule 56, FRCP.

The affidavits of the parties, together with their supporting exhibits, show the historical facts of the antecedent administrative proceedings to be substantially undisputed. There are, to be sure, hotly disputed issues as to the legal conclusions to be drawn from certain of those historical facts, but the facts themselves are not in issue.

(Footnote 1 continued from previous page).

as more particularly defined in § 5102(a) (4), and "...the duties and responsibilities of the position and the qualifications required by the duties and responsibilities..." determine the class in which a position is placed. §5106(a). A "grade" is a rate of basic pay, as more particularly defined in §5102(a) (5), and "...the level of difficulty, responsibility, and qualification requirements of the work of the class..." is the basis upon which the appropriate pay grade is determined. §5106 (b). The CSC is granted authority to ascertain the facts as to the duties, responsibilities, and qualification requirements of a position; to determine whether a position is in its appropriate class and grade; and to change a position from one class or grade to another when the facts warrant. § 5112(a). Furthermore, upon request of an affected employee, CSC is required to make such a determination. § 5112(b). The CSC is granted authority to prescribe regulations for the implementation of the powers conferred by the cited statutes. § 5115. Pursuant to that authority, CSC has promulgated regulations es ablishing a procedure by which a federal employee may appeal to CSC to determine the appropriate class or grade of his position. 5 CFR §§ 511.601-511.612. Judicial review of CSC actions is available under 5 U.S.C. §§701-706.

The chronology of the administrative proceedings is set out and documented in minute detail in the affidavits of the parties. It is sufficient for present purposes to condense and summarize the controlling facts.

On November 27, 1974 plaintiff, acting on his behalf and as designated representative of thirty other BATF special agents, as authorized by 5 CFR § 511.603(a), forwarded to CSC through BATF an appeal requesting a decision that they be upgraded to pay grade GS-12. Pursuant to 5 CFR §511.604(b) plaintiff requested that the appeal be forwarded by BATF to CSC if not favorably acted upon by BATF within thirty days. (Affidavit of William M. Pace, attachment 22). Subsequently, other BATF agents filed similar appeals designating plaintiff as their representative, the total of appealing agents ultimately reaching seventy-seven. On December 27, 1974 the Acting Director of Personnel of the Department of Treasury forwarded the appeals without action to the Atlanta Region of CSC, advising CSC and plaintiff that BATF could not make a determination within the prescribed thirty day limit. (Pace affidavit, att. 35) On January 24, 1975 the Atlanta regional office of CSC requested that Treasury furnish it with the administrative report on the appealed positions, which was supplied by Treasury to Atlanta CSC on March 4, 1975. (Affidavit of William M. Crater, pp. 3-4) On March 14, 1975 CSC concluded, and so advised plaintiff, that the appeals should be centralized in its Washington office, rather than being handled in the respective regions, because the appeals crossed regional lines and decisions thereon might have nationwide implications, and further because the questions raised by the appeals were then under study by a Treasury Task Force. (Pace affidavit, att. 56)

After receiving the records of the various appeals from its regional offices, CSC reviewed them and developed a review plan. The review plan contemplated the completion by each appealing special agent and his supervisor of questionnaires specifically designed by CSC for use in these appeals. The completed questionnaires were to be submitted to the appropriate CSC regional office, which would analyze the data and recommend to the Washington office of CSC a decision in each individual case. Washington CSC would then review the regional recommendations to insure that standards were consistently applied by all regions. A final decision would be made in each case by Washington CSC. The review plan also provided for audits of individual positions where necessary to resolve ambiguous or borderline cases or questionable issues. Whether or not to conduct such audits was to be left to the discretion of the regional CSC office, but it was suggested by Washington CSC that Atlanta CSC contact plaintiff for an audit of his position. (Crater affidavit, p. 4; Pace affidavit, att. 64)

On September 15, 1975 Washington CSC forwarded the questionnaires, instructions and other papers to the Atlanta, Dallas and Denver regional offices, and a copy was forwarded to plaintiff at the same time. (Pace affidavit, att. 64)

Plaintiff interpreted the CSC approach as an adverse ruling on the appeals and so advised CSC on September 19, 1975. (Pace affidavit, att. 65) A substantial volume of correspondence passed back and forth between plaintiff and Washington CSC in which CSC took the firm position that its review plan, including the questionnaire approach, did not constitute an adverse ruling on the appeals, but was the method chosen by CSC to develop the facts necessary for it to make a

ruling. Plaintiff, just as firmly, adhered to his interpretation that CSC had ruled adversely to the appealing agents, and he severely criticized the questionnaire approach and the questionnaire itself in a letter to CSC dated October 13, 1975. (Pace affidavit, att. 71) In that same letter, copies of which went to all appealing agents, plaintiff stated that he was advising the agents represented by him not to complete the questionnaires and further stated that any agent desiring to participate in the CSC review plan should revoke his designation of plaintiff as his representative. By this time plaintiff had employed an attorney, and a copy of his October 13, 1975 letter also went to the attorney.

On October 23, 1975 CSC replied to plaintiff's letter of October 13, recognizing as valid one of his criticisms of the questionnaire. (Pace affidavit, att. 72A) A clarifying letter was sent by CSC to each of the appealing agents, and each regional office of CSC was asked to send a similar clarifying letter to each supervisor involved. (Crater affidavit, p. 6) At the same time, plaintiff was reminded, as he had been previously, that failure of the appealing employees to cooperate fully with CSC might result in cancellation of the appeals. See 5 CFR §511.609(b).

On October 22, 1975 plaintiff again wrote to CSC advising that his attorney had that day filed this action seeking, *inter alia*, judicial review of the administrative action of the agency and CSC. (Crater affidavit, att. S) The complaint in this action was filed on that date. Plaintiff's October 22 letter was received by CSC on October 28, 1975. (Crafter affidavit, p. 6) On November 7, 1975 CSC again wrote to plaintiff, with copies to all appealing agents, reviewing its handling of the appeals and restating its position. Plaintiff was further

advised that, under the provisions of 5 CFR § 511.609(b), the appeals had been cancelled on the ground that plaintiff had failed to cooperate fully in the appeal process. (Pace affidavit, att. 73)

On November 23, 1976 (coincidentally, the date on which the magistrate heard oral argument on these motions) plaintiff retired from BATF.

The foregoing provides the factual background necessary to an understanding of the issues raised by these motions, and such additional undisputed facts as are relevant to specific points will be referred to where appropriate in the course of the following legal analysis.

Initially the motion for summary judgment was based entirely upon plaintiff's asserted failure to exhaust administrative remedies. However, when plaintiff's retirement became known defendants set up the additional ground that the action has been rendered moot by the retirement. That position is based upon *United States v. Testan*, 424 U.S. 392 (1976), in which the Supreme Court held that only prospective relief can be granted for improper classification of government employees, and that back pay is not authorized for the period of alleged wrongful classification. Plaintiff responds that, even if he can no longer hope to recover upon his own claim, the action should not be dismissed because he is here seeking to represent a class and the fact that his individual claim may not be a winning one does not justify dismissal of the class action, or, in the alternative, the court should allow a reasonable period of time for another member of the putative class to move to intervene and act as class representative before finally dismissing the action.

Plaintiff's individual claim is quite clearly moot under *Testan*, and plaintiff does not now contend otherwise. Having retired, he is no longer employed by BATF, and, since back pay is not authorized for the period of alleged wrongful classification, he would be entitled to no relief even if it should be subsequently determined that all BATF special agents should be classified CS-12.

It is equally clear that plaintiff is no longer a proper class representative under Rule 23(a) (4), FRCP. In order to act as a class representative under Rule 23, one must be a member of the class which he seeks to represent. *East Texas Motor Freight System, Inc. v. Rodriguez*, ____U.S. ___ , 45 L.W. 4524, 4526-4527 (decided May 31, 1977). One who can suffer no injury as a result of the practice complained of is not a member of the class, and is not a proper class representative. *Rodriguez, supra.* The Fifth Circuit has held that a retired employee is no longer a member of a putative class of active employees, and is therefore not a proper class representative, even under the liberal construction of Rule 23 required in Title VII employment discrimination cases. *Bradley v. Southern Pacific Company, Inc.*, 486 F.2d 516 (5 Cir. 1973). Accordingly, the motion for summary judgment should be sustained unless plaintiff's alternative argument that time should be allowed for another member of the class to step in as named plaintiff is well taken. Resolution of that issue requires that the court address itself to the issue of exhaustion of administrative remedies.

This is so because, even though a class action may be maintained on behalf of absent class members who have not exhausted administrative remedies, it is required that administrative remedies have been exhausted by the named plaintiff

who seeks to represent the class. *Oatis v. Crown Zellerbach Corporation,* 398 F.2d 496, 499 (5 Cir. 1968). Since plaintiff Pace was the designated representative of all of the appealing agents before CSC, his actions were their actions. If he has failed, acting in their behalf, to exhaust administrative remedies there is no member of the putative class who could properly proceed as named plaintiff in this action, because none have exhausted administrative remedies.[2]

It is a well established principle of federal law that exhaustion of available administrative remedies is a condition precedent to invoking the judicial process in the resolution of grievances against the government, its agencies, or officials. *Aircraft and Diesel Equipment Corp. v. Hirsch,* 331 U.S. 752 (1947); *Hodges v. Callaway,* 499 F.2d 417 (5 Cir. 1974); *Penn v. Schlesinger,* 497 F.2d 970 (5 Cir. en banc 1974), reversing panel decision, 490 F.2d 700, and adopting dissenting opinion of Godbold, J., 490 F.2d, at 707-714. In *Aircraft and Diesel Equipment Corp. v. Hirsch, supra,* the Supreme Court said of the exhaustion doctrine:

> "The doctrine, wherever applicable, does not require merely the initiation of prescribed administrative procedures. It is one of exhausting them, that is, of pursuing them to their appropriate conclusion and, correlatively, of awaiting their final outcome before seeking judicial intervention." 331 U.S., at 767.

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2. It is true that the putative class includes all GS-11 special agents, and is therefore not limited to the 77 agents represented by Pace before the CSC. However, there is nothing in the record to show that any other GS-11 agent has exhausted administrative remedies.

There are exceptions to the exhaustion requirement, but they are not to be liberally applied, and a strong showing of their applicability is required in order to short-circuit the administrative process, as the Supreme Court stated in *Aircraft and Diesel Equipment*:

> "It is true that the presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury flowing from delay incident to following the prescribed procedure, has been held sufficient to dispense with exhausting the administrative process before instituting judicial intervention. But, without going into a detailed analysis of the decisions, this rule is not one of mere convenience or ready application. Where the intent of Congress is clear to require administrative determination, either to the exclusion of judicial action or in advance of it, a strong showing is required, both of inadequacy of the prescribed procedure and of impending harm, to permit short-circuiting the administrative process. Congress' commands for judicial restraint in this respect are not lightly to be disregarded." 331 U.S., at 773-774.

By virtue of the statutory scheme described at note 1 *supra*, Congress has manifested a clear intent to require administrative determination of federal employee classification complaints in advance of judicial action. It is also abundantly clear that CSC made no adverse determination of the appealing agents' classification complaints by virtue of its

adoption of a review plan incorporating the use of questionnaires to be completed by the individual agents and their supervisors, plaintiff's conclusion to the contrary notwithstanding. The questionnaires were merely the device adopted by CSC to gather facts. Thus, under the principles enunciated by the Supreme Court plaintiff's failure to exhaust administrative remedies would be obvious, and the exhaustion issue would require little further discussion, but for the vigor with which plaintiff presses his argument that, once CSC decided upon the individual questionnaire approach, a result adverse to the appealing agents was predetermined and any further resort to administrative remedies would have been futile, resulting only in further delay and irreparable harm to plaintiff and the other agents represented by him.

Careful consideration has been given to the extensive briefs of the parties, to the copious authorities cited therein, and to the oral arguments of counsel. Plaintiff's position on the exhaustion issue, though skillfully and vigorously presented, is not supported by authority, nor by sound principles of administrative law. This is revealed by analysis of the cases upon which plaintiff relies.

Plaintiff cites *McKart v. United States*, 395 U.S. 185 (1969) to illustrate the principle that exhaustion of administrative remedies is not required in every case. However, in *McKart* the only factual issue was whether or not the defendant was a sole surviving son of a family whose father had been killed in military service. That defendant's father had been killed in military service and that defendant was the sole surviving son of the family was established without dispute. The only issue to be resolved was one of law. *McKart* was a criminal prosecution for failure to report for and submit to

induction into the armed forces, and the Supreme Court held that the defendant should not be deprived of a defense to a criminal charge for failure to exhaust administrative remedies when the facts were established beyond dispute and resolution of the controversy involved only decision of a point of law, which is the province of a court rather than an administrative agency. The court discussed the purposes served by the exhaustion requirement, 395 U.S., at 193-195, at least one of which is peculiarly applicable here.

> "...A primary purpose is, of course, the avoidance of premature interruption of the administrative process. The agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be held. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise. And of course it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages. The very same reasons lie behind judicial rules sharply limiting interlocutory appeals." 395 U.S., at 193-194.

Here, the facts upon which the classification of the positions of plaintiff and the agents represented by him are to be determined are neither simple nor clear, despite plaintiff's assertions to the contrary. CSC is vested by statute with the

responsibility of determining currently just those facts. 5 U.S.C. § 5112(a) (1); *Kavazanjian v. U. S. Immigration and Naturalization Service*, 399 F.Supp. 339, 345 (SD N.Y. 1975) The classification claims of plaintiff and those represented by him are peculiarly suitable for agency factual development and the application of agency expertise. See *Kavazanjian, supra.*

But plaintiff aruges that the exhaustion requirement is not to be applied blindly in every case, and has no application where exhaustion would be futile or the available administrative remedies are inadequate, citing *Lodge 1858 American Federal of Government Employees v. Payne*, 436 F.2d 882 (DC Cir. 1970); *McKart v. United States, supra; Ellis v. Naval Air Rework Facility*, 404 F.Supp. 391 (ND C. . 1975); and *NLRB v. Marine Workers*, 391 U.S. 418 (1968). *McKart* has been distinguished *supra.* In *Lodge 1858* further exhaustion of administrative remedies was not required because such remedies had already been exhausted and the Civil Service Commission had professed a lack of power to act. Therefore, further exhaustion would have been futile. No such circumstance exists here. CSC was ready and willing to act, and was in the process of doing so, when plaintiff short-circuited the administrative proceedings. *Ellis* merely stands for the principle, well established in the Fifth Circuit, see *Oatis v. Crown Zellerbach Corp., supra*, that exhaustion of administrative remedies is not necessary as to all members of a class if the named class representative has exhausted. *Marine Workers* involved only internal union grievance procedures, and the Supreme Court discerned no congressional intent to require the exhaustion of such internal remedies before filing a charge with the National Labor Relations Board or seeking subsequent judicial relief. Here, the congressional

intent to require exhaustion is manifested by the statute.

On the same point plaintiff also cites *Wallace v. Lynn*, 507 F.2d 1186 (DC Cir. 1974); *National Resources Defense Council v. Train*, 510 F.2d 692 (DC Cir. 1975); and *Marsh v. County School Board of Roanoke*, 305 F.2d 94 (4 Cir. 1962). *Wallace* is of no help to plaintiff because the court in that case held that exhaustion of administrative remedies was required. In *Marsh*, a school desegregation case, exhaustion was not required because the administrative procedure was itself a part of the discriminatory pupil assignment system. It was thus not an efficacious remedy. In *Natural Resources Defense Council* exhaustion was not required because the administrative agency, the Environmental Protection Agency, had already established a firm position on the issue at hand and indicated no disposition to reconsider it. 510 F.2d, at 703. In this case CSC has taken no such firm position, but was in the process of giving consideration to plaintiff's claims when its efforts to do so were frustrated by plaintiff's refusal to complete the questionnaire and his advice to those he represented that they should not do so. Plaintiff argues that this was justified because the questionnaire was loaded against him and the other GS-11 agents, and the result of the review procedure utilizing the questionnaire was therefore preordained.

An examination of the proposed questionnaires for the agents and their supervisors (Pace affidavit, att. 64, pp. 192-201), together with CSC's clarifying letter of October 23, 1975 (Pace affidavit, att. 72A) reveals the questionnaires to be well calculated to develop facts useful to CSC in determining whether or not the positions held by the appealing agents were in the proper class and grade according to the

classification standards prepared by CSC pursuant to 5 U.S.C. § 5105. The questionnaire approach is obviously not the way plaintiff would like to see the matter handled. It causes him to be pessimistic as to the outcome, but he is not entitled to equate his pessimism with futility of the administrative process. The courts are required, at the outset, to presume that the administrative agency will perform its responsibilities in good faith according to the law and its own regulations. *Hodges v. Callaway, supra*, 499 F.2d, at 424. In performing its statutory function CSC is not restricted to the method selected by plaintiff, but has some latitude. *Kavazanjian v. U. S. Immigration and Naturalization Service, supra*, 399 F.Supp., at 346.

United States v. Potter, 402 F.Supp. 1161 (D Mass. 1975) and *United States v. Hayden*, 445 F.2d 1365 (9 Cir. 1971) were both criminal prosecutions for violation of provisions of the Selective Service Act in which the courts refused to deprive defendants of the right to raise defenses because of failure to exhaust administrative remedies. In *Potter* the Selective Service System had failed to follow the procedure prescribed by its own regulations before reporting the defendant for prosecution. In *Hayden* exhaustion was not required because the issue upon which it was claimed the defendant had failed to exhaust his administrative remedies had already been judicially determined in his favor by a United States District Court in another matter. No similar circumstances are to be found in this case.

Plaintiff next argues that where the administrative remedies will be time consuming and delay will result in irreparable injury exhaustion should not be required, citing *Martinez v. Richardson*, 472 F.2d 1121 (DC Cir. 1973);

Comprehensive Group Health Service Board of Directors v. Temple University, 363 F.Supp. 1069 (ED Pa. 1973); and *Nader v. Federal Communications Commission*, 520 F.2d 182 (DC Cir. 1975). In *Martinez* the claimants for medicare benefits were all elderly and in poor health, and real danger existed that they might die before the administrative procedure and subsequent judicial review could be concluded. Furthermore, the federal question sought to be litigated was held to be so plain that exhaustion should be excused. In *Comprehensive* exhaustion was excused for many reasons, enumerated at 363 F.Supp., 1097-1098, of which the passage of time was only one, and a very minor one at that. *Nader* involved an FCC investigation of the rate structure of American Telephone and Telegraph Company. No decision had been reached on one aspect of the investigation after it had been in progress for more than ten years. On another aspect, no meaningful proceedings had even begun after a similar passage of time. Even under those circumstances, the administrative agency was allowed to proceed, but was required to establish a schedule for the orderly and expeditious resolution of the issues before it. No meaningful analogy can be drawn between those cases and the case *sub judice*.[3]

3. In connection with plaintiff's argument that exhaustion should be excused because of delay and resulting irreparable harm, a comparison of this case with *Kavazanjian v. U. S. Immigration and Naturalization Service, supra*, and *Brech v. United States Immigration and Naturalization Service*, 362 F.Supp. 914 (SD N.Y. 1973) is interesting, though not controlling, and perhaps not even significant. *Kavazanjian* and *Brech* both involved classification appeals by investigators and other officers of the Immigration and Naturalization Service. Both proceedings involved large numbers of positions. In *Brech* the appeal proceedings before CSC were pending for approximately two and one half years. In Kavazanjian the CSC appeal process consumed approximately one year, but was preceded by several years of dealings with the agency, which was alleged by the plaintiffs in *Kavazanjian* to have been acting

It is plaintiff's contention that a proper evaluation of the classification of the positions in question requires, not only a comparison of the work required with standards established by CSC (See 5 U.S.C. §5105), but also a comparison of the BATF special agent positions with positions in other federal law enforcement agencies. CSC was not willing to undertake such inter-agency comparisons, and on October 2, 1975 wrote to plaintiff explaining, *inter alia*, why it did not consider inter-agency comparisons to be appropriate. (Pace exhibit, att. 67) Briefly summarized, CSC's position was that it was required by statute, presumably § 5105, to classify positions by comparing them with standards published by CSC, rather than by comparing them with positions in other agencies for which the published standards might be different. Plaintiff characterizes CSC's position on inter-agency comparisons as illegal, arbitrary, and capricious. Plaintiff cites *Haneke v. Secretary of Health, Education and Welfare*, 535 F.2d 1291 (DC Cir. 1976) as authority for the proposition that inter-agency comparisons are required. *Haneke* does stand for that proposition, at least in the peculiar circumstances of that case, in which a very small number of positions were involved and the complaining employee was able to designate specific individuals in other agencies allegedly performing the same work as that being done by him. Nevertheless, the validity of the contention is not free from doubt.

(Footnote 3 - continued)

in bad faith. As is the case here, only prospective relief was available to the appealing officers in *Brech* and *Kavazanjian*, yet in both of those cases administrative remedies were fully exhausted before judicial relief was sought. The issues involved in those classification controversies bear many similarities to the substantive issues raised by plaintiff, yet the employees seeking reclassification in both of those cases were able to comply with the exhaustion requirement. Of course, no exhaustion issue was raised in eitther *Kavazanjian* or *Brech*, but the comparison is nevertheless interesting.

The only other court to hold consistently with *Haneke* was the Court of Claims in *Testan v. United States*, 499 F.2d 690 (Ct. Cl. 1974). In reversing *Testan*, the Supreme Court pretermitted the issue. 424 U.S., at 407. The issue has apparently not been decided in the Fifth Circuit. Whatever the merits of the argument may be, it is difficult to understand its bearing on the exhaustion issue. *Haneke* is not an exhaustion case. There, the complaining employee had exhausted all available administrative remedies, and the decision is expressly predicated upon that consideration. 535 F.2d, at 1296. Such an issue is properly for the reviewing court after administrative remedies have been exhausted. The exhaustion doctrine requires that the parties await the outcome of the administrative proceedings before seeking judicial intervention. *Aircraft Diesel Equipment Corporation v. Hirsch*, *supra*, 331 U.S. at 767, and this means that the administrative process should not be interrupted by judicial intervention at intermediate stages. *McKart v. United States*, *supra*, 395 U.S., at 194.

In short, no authority has been cited to the court in which exhaustion of administrative remedies has been excused in circumstances comparable to those existing here. The uncontradicted facts establish that plaintiff has failed to exhaust administrative remedies and that no good cause exists for excusing that failure. Accordingly, no purpose would be served by delaying dismissal to permit intervention by other class members. See pp. 7-8, *supra*. There being no genuine issue as to any material fact on the mootness or exhaustion issues, defendants are entitled to judgment as a matter of law, and their motion for summary judgment should be

sustained.[4] Rule 56(c), FRCP.

In view of the action recommended on the motion for summary judgment, it is unnecessary to consider plaintiff's motion to maintain class action.

It is therefore recommended that defendants' motion for summary judgment be sustained, and that the action be dismissed as moot.

Respectfully submitted, this the 8th day of July, 1977.

s/ J. David Orlansky
UNITED STATES MAGISTRATE

4. This will not leave those agents still in the service of BATF without recourse if they still wish to pursue their administrative remedies. Although 5 CFR §511.609(b) makes the reopening of cancelled appeals subject to the discretion of CSC "...on showing that circumstances beyond the control of the appellant prevented him from prosecuting the appeal...," CSC counsel stipulation into the record at oral argument that CSC is ready, willing and able to resume processing the appeals from the point where they were terminated if the appealing agents now wish to participate in the review procedure established by CSC.

APPENDIX B

Order of United States District Court -
dated September 21, 1977

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

WILLIAM N. PACE,
Plaintiff

v. NO. EC 75-168-S

DEPARTMENT OF THE TREASURY, et al.,
Defendants

ORDER

Upon consideration of the motion of defendants to dismiss, or in the alternative, for summary judgment, together with the file and records in this action, including the Report and Recommendations of the United States Magistrate dated July 8, 1977, and objections of plaintiff thereto, the court is of the opinion that the Report and Recommendations of the United States Magistrate should be approved and adopted as the opinion of the court and the objections thereto overruled; and as to defendants, the motion for summary judgment should be sustained. It is, therefore

ORDERED:

(1) That the Report and Recommendations of the United

States Magistrate dated July 8, 1977, be, and it is hereby, approved and adopted as the opinion of the court, and plaintiff's objections thereto are overruled and denied;

(2) That defendants' motion for summary judgment be, and it is hereby, sustained, and that this action be, and it is hereby, dismissed; and

(3) That the clerk be, and he is hereby, directed to prepared and serve upon counsel of record for each of the parties, certified copies of this order, each of said persons having heretofore been served by the magistrate with copies of his report and recommendations.

This 21st day of September, 1977.

s/ (Signature Illegibile)
UNITED STATES DISTRICT
JUDGE

Entered 9/22/77
COB 28, pg. 274,275

APPENDIX C

Decision of U.S. Court of Appeals for the Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DO NOT PUBLISH

NO. 77-3342
Summary Calendar*

WILLIAM M. PACE, ET AL.,
Plaintiffs-Appellants,

vs.

DEPARTMENT OF THE TREASURY, ET AL.
Defendants-Appellees,

Appeal from the United States District Court for the
Northern District of Mississippi

(September 28, 1978)

FILED: Oct 24, 1978

Before MORGAN, CLARK and TJOFLAT, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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* Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

1. See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

Costs are taxed against plaintiffs-appellants.

Issued As Mandate: Oct 20 1978

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U.S. Court of Appeals, Fifth Circuit

By: s/ Brenda Hauck
Deputy

New Orleans, Louisiana, Oct 20, 1978

APPENDIX D

Order of U.S. Civil Service Commission,
dated September 15, 1975

UNITED STATES GOVERNMENT

MEMORANDUM U.S. CIVIL SERVICE COMMISSION

Subject: Request for Regional Office Assistance in Processing the Classification Appeals of William M. Pace et al., Criminal Investigators, GS-1811-11, Bureau of Alcohol, Tobacco and Firearms

From: s/ David B. Talty
David B. Talty, Chief
Classification Appeals Office

To: Director, Atlanta Region
Director, Dallas Region
Director, Denver Region

Date: Sep 15, 1975
In Reply Refer To:
PMC:APP
Your Reference:
J. J. Lafferty
John J. Lafferty
Acting Director

The purpose of this memorandum is to request the assistance of the above regional offices in processing the classification appeals of a group of Criminal Investigators, GS-1811-11,

employed by the Bureau of Alcohol, Tobacco and Firearms (BATF) of the Department of Treasury. The investigators have designated ATF Special Agent William Pace, who is both an appellant and an AFGE official in Aberdeen, Mississippi, to represent them.

Background

Earlier this year this Office agreed to centralize the position classification appeals of the group of ATF Special Agents whose duty stations are located in the Atlanta, Dallas and Denver Regions. At the time this approach was considered expedient in view of the fact that the appeals cross regional lines and the decision might, therefore, have nationwide implications. However, after thoroughly reviewing the appellate record and examining the central issue in the appeal, we now see the situation from a different perspective. We initially considered this appeal to be similar to past nationwide cases which were handled by conducting onsite audits of a sample of the positions and then applying the resulting decision to the remainder of the positions in the appeal. After studying the file closely, we conclude that the normal sampling procedure is not a viable approach in this instance. In view of the nature of the appeal as outlined below, we believe that each appellant's position will have to be reviewed and a separate classification advisory opinion issued covering each position.

All of the appellants are assigned to a standard position description (SPD Number 015). The appellants are not questioning the accuracy of that document, but rather they are contending that regardless of what the position descriptions state, GS-11 and GS-12 investigators perform the same work.

The central issue in the appeals, therefore, is the appellants' allegation that there is no distinction in the investigative assignments made to, or initiated by, GS-11 and GS-12 Criminal Investigators in the BATF. The appellants maintain that all ATF Special Agents are assigned a geographical area of responsibility wherein they investigate violations of the full range of laws enforced by the Bureau regardless of the grade level of the work involved in the cases. Information obtained from the Treasury Department confirms some of the appellants' contentions and also indicates the procedure that the Bureau (ATF) follows to classify investigator positions at this level. According to BATF: "The great bulk of an ATF Agent's workload consists of cases developed by the Agent himself, and we review the Agent's work by analyzing the cases he has worked on and other duties he has performed over a twelve or eighteen month period, and comparing this to the Civil Service Commission approved SPD and the 1811 standard.... We concentrate on whether an employee is performing GS-12 duties."

Since the classification appeals in this instance involve, in effect, mixed-grade positions, it is not feasible as mentioned earlier, to audit a sample of the positions and thereby arrive at a decision that can be applied broadly to all of the positions appealed. Rather, each position will have to be individually reviewed to determine whether the appellant is performing work at the GS-12 level and, if so, what percentage of his total work time is spent on the higher level casework.

Review Plan

To accomplish this task quickly and thoroughly, we have developed questionnaires to be completed by each appellant and his immediate supervisor (Attachments 1 and 2). This

approach we believe will generally develop sufficient current and accurate information about each appellant's position to permit individual appeal decisions to be made. We are asking for your assistance in distributing the questionnaires, in analyzing the data, and in recommending a decision in each case. This Office will review the recommendations from all three regions only to insure that the standards have been applied consistently across regional lines. We will issue a final decision in each case in the form of a certificate. Any request for reconsinderation will be handled by the Classification Appeals Office with the customary request for comment on the case from the region involved. Although it may be burdensome, we believe that this procedure is the only way to guarantee that each appeal is fairly and fully considered.

As previously stated, we feel that the questionnaire data should provide a sound basis for arriving at a decision in most of the cases. It may be necessary to audit some of the positions, however, to resolve ambiguous or borderline cases or questionable issues (for example, where an appellant claims that because of the organizational setting he must perform work classifiable at the GS-12 level but he does so for less than a majority of the time). We leave to your discretion the decision of whether or not to conduct any onsite interviews. We do suggest, however, that Special Agent Pace be contacted for an audit by a representative of the Atlanta Region.

We ask that your recommendations in the appeal cases be combined into the following categories:

1. Those positions which are not classifiable at the GS-12 grade level, and why;

2. Those positions which clearly support the GS-12 grade level, and why; and

3. Those positions which you believe support the GS-12 grade level, but where the appellant spends *less* than the majority of the time on the higher grade work.

To aid in our review of the appeals, please follow the report format shown in attachment 3 in preparing your evaluation statements on each position. Attachment 4 is the administrative report prepared by the Department of the Treasury. We recommend that you work through the ATF regional personnel office and ask that office for assistance in distributing the questionnaires and arranging for any onsite interviews. Attachment 5 is a list of the names and addressed of the appellants in your region. We are also returning to each region the case files that were forwarded to us when the appeals were centralized.

For work reporting purposes charge all time spent on processing these appeals *after* September 28, 1975, to the new PSEUDO code F110. This code will have to be written in on the work report form in the PSEUDO code column. Prior to September 28th credit the processing time to PSEUDO code F100.

Attachments

APPENDIX E

5 U.S.C. 702

Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 94-574, § 1 21, 1976, 90 Stat. 2721.

APPENDIX F

5 U.S.C. 5101(1)(A)

Sec. 5101 Purpose

It is the purpose of this chapter to provide a plan for classification of positions whereby -

(1) in determining the rate of basic pay which an employee will receive -

(A) the principle of equal pay for substantially equal work will be followed.

No. 78-1035

In the Supreme Court of the United States

OCTOBER TERM, 1978

WILLIAM M. PACE, PETITIONER

v.

DEPARTMENT OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1035

WILLIAM M. PACE, PETITIONER

v.

DEPARTMENT OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, formerly a GS-11 agent of the Bureau of Alcohol, Tobacco and Firearms (BATF), seeks reclassification as a GS-12. Purporting to represent a class composed of all GS-11 BATF agents, petitioner contends that all BATF agents perform essentially the same work and therefore must be assigned to the same civil service grade. Petitioner also argues that he and the other class members are entitled to reclassification because employees of other federal criminal investigative agencies doing substantially the same work are classified in a grade higher than GS-11.

1. In November 1974 petitioner requested the Civil Service Commission to reclassify him (and 30 other BATF agents whom he represented) to GS-12 positions

(Pet. App. A-4).[1] After initially indicating that the requests would be handled by its Washington office, the Commission advised petitioner, and the agents he represented, that each agent should complete a questionnaire about his work and that each questionnaire would then be evaluated by the appropriate regional office. Petitioner objected to this procedure and chose to treat the instruction as an "adverse decision." He refused to provide the requested information to the Commission and advised the other agents not to cooperate. The Commission informed petitioner that it had not rejected his claim but was merely attempting to develop the factual record necessary to enable the agency to rule on the reclassification requests. Petitioner nonetheless persisted in his interpretation of the Commission's action and filed this suit in the United States District Court for the Northern District of Mississippi seeking review of the Commission's "decision."

The district court referred the case to a magistrate, who recommended that the suit be dismissed because "[t]he uncontradicted facts establish that [petitioner] has failed to exhaust administrative remedies and that no good cause exists for excusing that failure" (Pet. App. A-18). The magistrate also observed that petitioner retired from his BATF employment while this action was pending in the district court (*id.* at A-7). Accordingly, the magistrate stated that petitioner's personal claim is moot and that he cannot proceed as a class representative because he is no longer a member of the class seeking reclassification (*id.* at A-7 to A-8). The magistrate made no recommendation concerning the substitution of another class member as class representative, because he found that the Commission had not made a final decision with respect to any

[1]The number of agents represented by petitioner subsequently grew to 77 (Pet. App. A-4). Because of its disposition of the case, the district court did not need to determine whether to certify petitioner's suit as a class action (*id.* at A-19).

class member and therefore that no class member had exhausted his administrative remedies (*id.* at A-9). The district court adopted the magistrate's report and recommendation (*id.* at A-20), and the court of appeals affirmed (*id.* at A-22).

2. Petitioner contends (Pet. 5-6) that the procedure chosen by the Commission for evaluating his reclassification request and the similar requests of other BATF agents will result in a failure to consider the correctness of existing classifications by reference to the classification of comparable positions in other federal law enforcement agencies. Petitioner argues that *Haneke* v. *Secretary of HEW*, 535 F. 2d 1291 (D.C. Cir. 1976), requires the Commission to conduct such comparisons and not to decide reclassification requests simply by reference to Commission-established standards for particular grade levels. The district court correctly concluded, however, that the Commission's request for information concerning the individual class members' jobs was reasonable and that petitioner's disagreement with the Commission's approach can not excuse his failure to await an administrative disposition of his claim before resorting to judicial review (Pet. App. A-14 to A-15).

Petitioner himself has retired and is not entitled to either reclassification or back pay. *United States* v. *Testan*, 424 U.S. 392 (1976). Petitioner's claim is moot, and he is not a proper class representative because he is no longer a member of the class he seeks to represent. *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977). If a proper class representative pursues his request for reclassification and obtains a final decision from the Commission, the Commission's method of processing and evaluating such requests can be challenged on judicial review of the agency's decision. Until then, judicial review is not warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1979

DOJ-1979-02